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No. 83-448

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

ANN MACDONALD and CARL JASON,
Petitioners,

vs.

FERGUSON REORGANIZED SCHOOL DISTRICT R-2, DR. RAY HOWELL, JOSEPH WELLS, DALLAS IMBEAUX, CAROL BARNES, JAMES POOR and EDWARD W. WILHELMS (constituent members of the Board of Education of Respondent school district),
Respondents.

On a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

At the time of trial, Petitioner Carl Jason was assistant principal of McCluer North Senior High School (T. 13) and Petitioner Ann MacDonald was coordinator of community services of Respondent Ferguson Reorganized School District R-2. Previously, Petitioner MacDonald had been assistant principal of Berkeley Junior High School. (T. 126-27). Both McCluer North Senior High School and Berkeley Junior High School are

schools within the Ferguson Reorganized School District R-2, which is a public school district in St. Louis County, duly organized and existing under the laws of the State of Missouri. (Stip. 1).

Petitioners prior to 1976 had been employed by the Kinloch School District—Mr. Jason as principal of Kinloch High School and Ms. MacDonald as principal of Kennedy Junior High School. (T. 13, 127).

Petitioners were transferred from their positions in the Kinloch School District to positions in Respondent School District, because of a judgment and decree entered June 7, 1975 by the United States District Court for the Eastern District of Missouri, in the matter of *United States* v. *The State of Missouri,* Cause No. 71C555(1) (Respondents' Ex. E), which was entered pursuant to the Eighth Circuit's prior decision in that cause, reported at 515 F.2d 1365. That judgment and decree ordered the immediate annexation of the Kinloch and Berkeley School Districts by the then Ferguson Reorganized School District R-2. Included in the Order mandating annexation was the mandate that the Kinloch High School and the Kennedy Junior High School be closed as of the end of the academic year 1975-76.

Neither of the Petitioners complained or raised the issue of demotion at the time of their respective transfers and reassignments (T. 430-32). In fact, Petitioner Jason in April, 1976, wrote to Respondent school district relative to his salary, yet made no reference nor complaint of any demotion or of any rights allegedly granted by *Singleton* v. *Jackson Municipal Separate School District,* 419 F.2d 1211 (5th Cir. 1970), *cert. denied,* 396 U.S. 1032 (1970). It is clear that Petitioner Jason did not consider his transfer a demotion. (See Respondents' Ex. A). Both reassignments were reported to the District Court in Court ordered reports filed by Respondent in February 1976 and October 1976 and were identified as lateral moves.

By its Order and opinion of August 27, 1973, the District Court found that the educational opportunities provided in the Kinloch School District were markedly inferior to the opportunities offered in the Respondent District, as well as those offered in most other districts in St. Louis County. *United States* v. *The State of Missouri,* 363 F.Supp. 739 (E.D.Mo. 1973). Among the District Court's findings were:

(1) "[I]n the 1970-71 school year, Kinloch district had the lowest assessed valuation per pupil in ADA [average daily attendance] of any school district in St. Louis County; Kinloch's assessed valuation was one-third of Ferguson's and one-sixth of Berkeley's." 363 F.Supp. at 744.

(2) Testimony indicated that "Kinloch buildings and equipment were markedly inferior to the buildings and equipment in the other two districts, particularly at the high school and junior high school levels." 363 F.Supp. at 744.

(3) The number of library books available to the students in Kinloch were significantly lower. 363 F.Supp. at 744.

(4) Average salaries of teachers in Kinloch were considerably lower. 363 F.Supp. at 744.

(5) "[A] higher faculty turnover rate and a lower percentage of teachers with master's degrees" existed as compared to the other two school districts, which had "a significant effect on the quality of educational programs" offered in Kinloch. 363 F.Supp. at 744.

(6) Kinloch High School students had a much "more limited choice of curricula." 363 F.Supp. at 744.

The Missouri Department of Education classified the Kinloch School District "AA" while both the Berkeley and Ferguson Districts were classified as "AAA," the highest rating. (Request for Admission No. 3; T. 218). The Ferguson and Berkeley School Districts were members of and accredited by the North

Central Association, a voluntary association of colleges and secondary schools, while the Kinloch School District was not a member of nor was it accredited by this Association. The present enlarged school district is a member of and accredited by this Association (T. 382-84).

Petitioner Jason's last year of employment by the Kinloch School District was during the 1974-75 school year. During this year, pupil enrollment at Kinloch High School was 262. There were 22 teachers at the high school plus 15 student teachers (Stip. 3). For the school year 1976-77, Jason was reassigned from the position of principal at Kinloch High School to assistant principal at McCluer North High School (Stip. 6). During this school year, student enrollment at this high school was 2,407 and the number of teachers was 119. At McCluer North Senior High School, Jason had direct supervisory responsibility for approximately 600 students and 30 teachers (Stip. 7). Jason's salary was increased from $16,500.00 for the school year 1974-75 to $21,500.00 for the school year 1976-77, his first year as assistant principal at McCluer North High School.

Petitioner MacDonald was appointed principal of the Kennedy Junior High School in the Kinloch School District during the last quarter of the 1973-74 school year, was appointed principal for the academic year 1974-75 and continued as principal through the school year 1975-76 (Stip. 5). During the school year 1974-75, the pupil enrollment at Kennedy Junior High School was 170 and there were 10 teachers plus 10 student teachers (Stip. 3). Although it was labelled a junior high school, Kennedy included only the 7th and 8th grades rather than the traditional pattern of 7th, 8th & 9th grades. Kennedy actually was what educators refer to as a middle school. In the school year 1976-77, Petitioner MacDonald was assigned to Berkeley Junior High School as an assistant principal. The student enrollment at this school during that year was 1,007 and the number of teachers was 71. The administrative staff consisted of one principal and two assistant principals. At Berkeley Junior High,

Petitioner MacDonald had supervisory responsibility for approximately 500 students and 35 teachers. Berkeley Junior High consists of grades 7, 8 and 9, while Kennedy Junior High School, a traditional middle school consists of only grades 7 and 8. (Stip. 8). During her last year as an employee of the Kinloch School District for the school year 1974-75, Petitioner MacDonald received a salary of $13,600.00. Her salary increased to $20,000.00 for the school year 1976-77, when she was transferred from Kennedy Junior High School to Berkeley Junior High School (Stip. 11).

The testimony of both Petitioners that the level of their responsibilities and skills utilized was diminished upon their transfer from the Kinloch School District to Respondent school district, was thoroughly refuted by Respondents' witnesses. Joseph Wells, President of the Board of Education of Respondent school district (and former President of the Kinloch School Board) (T. 193-194), testified that he was personally acquainted with both Petitioners, was acquainted with their duties for the Kinloch School District and with their duties at the Respondent Ferguson District; and, after having heard all of their testimony, was of the opinion that neither Petitioner was demoted by reason of their transfers (T. 196-98). Kenneth Kirchner, formerly with the Missouri Department of Education, was actively involved in developing the plan for annexation of the Kinloch and Berkeley School Districts into the Ferguson Reorganized School District R-2. He testified that he was familiar with all of the involved school districts and made comparisons among them (T. 214-19). It was his opinion that a transfer from principal at Kinloch High School to assistant principal at McCluer North High School and a transfer from principal at Kennedy Junior High School to assistant principal at Berkeley Junior High School were both, in fact, *promotions* (T. 224-25).

Bill Hampton, principal at McCluer North High School, testified as to the operation of McCluer North High School (T.

233-34). He testified as to Petitioner Jason's duties at the high school as assistant principal, which duties included direct supervision of 20 to 25 teachers, supervision of the social studies department for two or three years, examination of curriculum, and improvement of instruction and evaluation of each teacher in that department (T. 235). Petitioner Jason also acted as personal advisor to 18 to 20 students, as did every member of the McCluer North faculty, including administrators (T. 236-37). The responsibility for managing the curriculum, including its content and instructional practices, was in the hands of all five administrators, including Petitioner Jason, all of whom shared an equivalent load (T. 237).

Henry Prokop, assistant superintendent in charge of secondary education, testified that there were no written descriptions of the duties of principal at either the high school or junior high school in the Kinloch School District (T. 273-74). He further testified that he had heard the testimony of both Petitioners Jason and McDonald and believed each transfer constituted no less than a lateral move and did not constitute a demotion under any circumstances. (T. 274). Mr. Prokop explained Petitioner MacDonald's duties in her new job as community coordinator (T. 275-76). His testimony also dealt with the skills required of her as principal at Kennedy Junior High School. In his opinion the position of principal at the latter school required less skill than the position of an assistant principal at the junior high school in Respondent district. His reasons for this included among others, the facts that at Kennedy Junior High School, there was a small number of teachers being supervised, the relative smallness of the physical structure itself, the absence of a cafeteria, the absence of an industrial arts and home economics programs, and little or no purchasing done at the institution itself (T. 371-73).

Finally, Dr. Warren Brown, superintendent of Respondent district, testified as to the differences between the Kinloch and Ferguson School Districts and as to the responsibilities and

skills exercised by Petitioners. In the Kinloch District the superintendent exercised many of the duties and had many of the responsibilities, which a principal in a high school or junior high school exercises and has in the Ferguson District. Although Petitioners did not make the final decisions as assistant principals at McCluer North High School or at Berkeley Junior High School, neither did they make such final decisions in the Kinloch District, since such decisions and authority were reserved for the superintendent of the Kinloch School District (T. 426). It was his opinion that the transfers of both Petitioners constituted *promotions,* or no less than lateral moves (T. 531).

In the summer of 1977, two administrative positions became available. These positions were for principal at McCluer High School and for principal at Ferguson Junior High School. Since these two positions could not be filled by lateral transfers, a formal committee was created to screen potential candidates within the Respondent Ferguson School District for these openings (T. 432-34).

The formal screening committee procedure for selecting candidates for promotion had been consistently utilized in the Respondent Ferguson District since 1964 (T. 281). However, before its use on this occasion, Dr. Brown secured the express approval of the Board of Education, and also discussed the proposed use of the screening committee with those state and federal agencies monitoring Respondent district by reason of the judicially-ordered annexation. These agencies believed it to be an objective, non-discriminatory process (T. 434-36).

The position openings were publicly announced in May, 1977 and 13 people within the district applied for either one or both of the two positions (T. 434).

The selection committee consisted of six staff members within the school district: Bill Hampton, principal at McCluer North High School; Edna Jackson, librarian at McCluer High School; Ruby Livingston, teacher at McCluer High School; John A.

Wright, assistant superintendent; Henry E. Prokop, assistant superintendent; and Paul B. Koch, assistant superintendent (Stip. No. 9). Edna Jackson and John A. Wright are black and the remaining members of the committee are white (T. 79).

Each candidate was interviewed by the committee for at least 15 to 20 minutes and was then evaluated by the committee after he or she had left the room, for an additional 15 or 20 minutes (T. 333-34). Each candidate was evaluated by a set of guidelines which had been applied in identical fashion by similar screening committees over the past 15 years. Similar guidelines are used for evaluating administrative competence in both industry and management (T. 438).

The candidates were each evaluated in 12 separate criteria using a 1 to 10 point scale (T. 241-44 and documents attached to 2nd Stip.). The final rankings of the screening committee for the position of principal at McCleur High School were:

1. Wayne Fields
2. M. Dolores Graham
3. William Emrick

The final rankings of the screening committee for the position of prinicipal at Ferguson Junior High School were:

1. Daryl K. Hall
2. Carl Swaringim
3. Ann MacDonald

Recommendations were then made by the committee to Dr. Brown and he, in turn, recommended to the Board of Education that Wayne Fields be appointed principal at McCluer High School, that Daryl K. Hall be appointed principal at Cross Keys Junior High School and that Carl Swaringim be appointed principal at Ferguson Junior High School. The Board of Education

acted favorably on these recommendations and these individuals were so appointed (2nd Stip., No. 1). An appointment for principal at Cross Keys Junior High School was made when this position became open because of Wayne Fields' appointment to be principal at McCluer High School (T. 443).

Two of the members of the selection committee, Henry Prokop and Bill Hampton, both testified that they never received any instruction by anybody higher in authority or within the school district as to the selection results they should reach, nor did they know any committee member who had been so instructed (T. 244-45, 279-80). Dr. Brown testified that he did not prescribe the guidelines to be used to rate each of the candidates, nor did he attempt to influence or to control the selection of the candidates by the committee (T. 438). All of the Respondents' witnesses affirmatively denied that the screening committee was a sham or that the selection process was rigged (T. 246, 280, 438-39).

ARGUMENT

The Procedural Deficiency of Petitioners' Petition

The "Questions Presented" as framed on page three (i) of Petitioners' "Petition for Writ of Certiorari" are issues neither presented to nor resolved below by either the District Court or the Eighth Circuit. As noted in *Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 34 (1977) by this Honorable Court in disposing of a case before it on a writ of certiorari, "since it was neither pleaded, argued, nor briefed either in the District Court or in the Court of Appeals, we will not consider it."

The fact that Petitioners are presenting new questions here is evident by Petitioners' statement of the issues as contained in their brief to the Court of Appeals.

I. THE DISTRICT COURT'S RULING THAT APPELLANTS WERE NOT DEMOTED BECAUSE THEY RECEIVED PAY INCREASES UPON AND SUBSEQUENT TO REASSIGNMENT TO MC CLUER NORTH AND BERKELEY WAS CLEARLY ERRONEOUS BECAUSE NO SUCH INFERENCE IS LOGICALLY RAISED FROM THE FACTS IN EVIDENCE.

II. THE DISTRICT COURT'S FINDING THAT JASON AND MAC DONALD CARRIED AS MUCH RESPONSIBILITY AS ASSISTANT PRINCIPALS AT MC CLUER NORTH AND BERKELEY AS THEY HAD AS PRINCIPALS OF KINLOCH AND KENNEDY WAS CLEARLY ERRONEOUS BECAUSE THE COURT FAILED TO COMPARE AND ANALYZE THAT AMOUNT OF RESPONSIBILITY ATTENDANT TO EACH POSITION.

III. THE DISTRICT COURT'S FINDING THAT THE ASSISTANT PRINCIPALSHIPS AT MC CLUER NORTH AND BERKELEY REQUIRED AT LEAST AS MUCH SKILL AS APPELLANTS' PRINCIPALSHIPS AT KINLOCH AND KENNEDY WAS CLEARLY ERRONEOUS BECAUSE THE COURT FAILED TO ANALYZE AND COMPARE THE SKILLS REQUIRED TO PERFORM THE ASSIGNED DUTIES.

("Appellants' Brief" to the Eighth Circuit at v-vi).

The true issues presented by Petitioners in both the District Court and the Court of Appeals were whether or not the facts support the trial court's conclusions (1) that neither Petitioner was demoted, thereby making *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970), *cert. denied*, 396 U.S. 1032 (1970) inapplicable and (2) that the selection process used by Respondents in appointing principals of three secondary schools was not discriminatory.

Accordingly, the "Questions Presented" by Petitioners were neither pleaded, argued, briefed or decided before by any of the parties or the courts below in this cause, and their resolution is inappropriate at this stage of the proceedings before this Honorable Court.

The Inapplicableness of *Singleton*

Petitioners' reliance upon *Singleton* v. *Jackson Municipal Separate School District*, 419 F.2d 1211 (5th Cir. 1970), *cert. denied*, 396 U.S. 1032 (1970) is misplaced, for it is not applicable to the present cause. In its most recent exposition of *Singleton's* reinstatement preference principle, the Fifth Circuit clearly stated:

> At the outset, we note that our cases have consistently stated that *Singleton's* reinstatement preference is a limited

remedial device designed to deal with only one of many problems encountered in the course of dismantling a dual school system — the problem of fewer faculty and administrative positions being available in many school districts as a result of the merger of formerly segregated schools. "The application of *Singleton's* dismissal and demotion standards *is limited to the particular problem of a smaller faculty caused by school desegregation.*" *Lee* v. *Russell County Board of Education,* 563 F.2d 1159, 1161 (5th Cir. 1977). Cognizant of the principle that "rules do not run beyond the reasons which occasion them," *Wright* v. *Houston Independent School District,* 569 F.2d 1383, 1384 (5th Cir. 1978), we have repeatedly held that *Singleton's* reinstatement preference proviso applies only in cases where a school district reduces the total number of faculty or administrative positions in its schools as a result of desegregation. *Cousin* v. *Board of Trustees,* 648 F.2d 293 (5th Cir. 1981) (in order for *Singleton's* reinstatement preference proviso to apply "there must be a desegregation-related reduction in personnel resulting in a demotion or dismissal"); *Wright* v. *Houston Independent School District, supra* ("The Law of the question is now clear that it is a desegregation related general reduction in force that triggers *Singleton's* application."); *Barnes* v. *Jones County School District,* 544 F.2d 804 (5th Cir. 1977) *unless there is an overall reduction in force as a result of desegregation, a dismissed or demoted faculty member cannot claim right to reinstatement under* Singleton); *Pickens* v. *Okolona Municipal Separate School District,* 527 F.2d 358, 361 (5th Cir. 1976) ("[T]his court did not intend that the strict requirements of *Singleton* apply in the absence of desegregation related reductions.") *Even if a school district in the process of desegregation reduces the number of minorities on its faculty while increasing the total number of faculty it employs, the particular provision of* Singleton *governing reinstatement of employees af-*

> *fected by desegregation-related dismissals and demotions does not apply. Barnes* v. *Jones County School District, supra.*

Fort Bend Independent School District v. *City of Stafford,* 651 F.2d 1133, 1139 (5th Cir. 1981). (Emphasis supplied).

Of critical importance in this cause is the total absence of any reduction in the number of faculty or administrators of the Kinloch School District, the Berkeley School District or the Ferguson Reorganized School District R-2, by reason of the court-ordered annexation. (*See* Respondents' Ex. I at 15-16 and Ex. J at 15. Said Exhibits are respectively, "REPORT TO THE COURT CIVIL ACTION NO. 71 C 555(1) FEBRUARY 16, 1976 *VOLUME I*" and "REPORT TO THE COURT OCTOBER 15, 1976 CIVIL ACTION NO. 71 C 555(1) VOLUME 1"). Reasignments similar to the reassignments of Appellants MacDonald and Jason were expressly approved and noted by the District Court and by the Eighth Circuit:

> (6) Administration of the reorganized district in 1975-76 was directed to include the present superintendent of Ferguson, with the superintendents of Berkeley and Kinloch serving as assistant superintendents;

United States v. *State of Missouri,* 523 F.2d 885, 887 (8th Cir. 1975).

The absolute absence of any demotion experienced by either Petitioner in 1976, as so clearly and thoroughly documented by the District Court below (530 F.Supp. at 475) requires acceptance here. This Honorable Court should faithfully adhere to its recent holdings in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.,* 456 U.S. 844, 857 n. 20 (1982) and in *Pullman-Standard, a division of Pullman, Incorporated* v. *Swint,* 456 U.S. 273, 286 n.16 (1982).

This Honorable Court's observations in *Inwood Laboratories, Inc.* and in *Pullman-Standard* are particularly applicable here.

> Rule 52 broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a Court of Appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

Pullman, 456 U.S. at 286.

An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *Inwood Laboratories, Inc.,* 456 U.S. at 857.

Nor, as the dissent in the Eighth Circuit's prior panel decision apparently did, may it be deemed or assumed that a transfer from the position of principal to assistant principal automatically or axiomatically constitutes a demotion. In its most recent discussion of this identical point, the Fifth Circuit has observed:

> In *Singleton* cases, we have not adopted a rigid "per se" or "title" rule for determining whether "demotions" took place and, *depending* on the *actual* duties, responsibilities and compensation of the two particular jobs involved in a given case, *a transfer from principal to assistant principal may or may not be a demotion. See Hereford,* 574 F.2d at 273-74; *United States* v. *Gadsen County School Dist.* 539 F.2d 1369, 1376 (5th Cir. 1976) (" . . . [T]he focus in a case like this must remain on the responsibilities actually borne by the particular person in the particular position."); *Roper* v. *Effingham County Board of Education,* 528 F.2d 1024, 1025 (5th Cir. 1976). See also the district court opinion in *Hardy* v. *Porter,* 443 F.Supp. 1164, 1172 (N.D.Miss. 1977), *affirmed and opinion approved,* 613

> F.2d 112, 114 (5th Cir. 1980). Here there is no evidence as to the relative duties, responsibilities and compensation of principals and assistant principals. Of course, we do not suggest that a proper essentially statistical showing can under no circumstances ever suffice to establish a *prima facie* case as to principals or any other single classification of employees.

Price v. *Denison Independent School District,* 694 F.2d 334, 337 n. 81 (5th Cir. 1982). (Emphasis supplied).

The findings of the District Court below are identical to those found in *Hardy* v. *Porter,* 443 F.Supp. 1164, 1168 (N.D.Miss. 1977), *affirmed,* 613 F.2d 112 (5th Cir. 1980). (Emphasis supplied).

> 6. In his post as assistant principal, Hardy was not simply transferred to a strange building, he encountered unique and unprecedented problems to be reasonably expected in any sudden school reorganization of a biracial character. The clear weight of the evidence is, and the court finds the fact to be, that the duties which Hardy performed at Clarksdale High School as assistant principal were no less responsible or important than those which he performed as Higgins' principal. Indeed, greater skill in human relations, to achieve cooperation with students and faculty of both races, was called for in the new administrative position. *We find as a fact that the assistant principalship of a large integrated high school, attended by older students of both races in their last years of public education and taught by a diversified biracial faculty, quite different from the traditional high school setting, may not be fairly regarded as a demotion. The label that an administrator may be given is certainly not conclusive,* or even persuasive, *on the question of whether Hardy experienced a demotion in the responsible aspects of his work as an educator.*

443 F.Supp. at 1168.

> [I]t is likewise clear that no such failure to promote is actionable under the Fourteenth Amendment unless it was motivated by purposefully racial consideration, and mere disproportionality in school district employment matters does not amount to an infringement of constitutional rights, absent a violation of *Singleton* . . .
>
> . . . .
>
> We think it is plain from the foregoing in *Castaneda,* as well as being implicit in our other decisions in this regard, that in the public school employment practices area plaintiffs must make a *prima facie* case before the burden will shift to the defendant school board, and that the necessary *prima facie* case does not consist of *merely* showing a "relatively recent history of discrimination."

Price, supra, 694 F.2d at 375-76. (Emphasis supplied).

To stretch *Singleton* to the limits of the Eighth Circuit panel's dissent would impose impossible burdens, as well as impractical burdens, upon Respondents. If the assumed position of Petitioners is correct, then the recent retention under a three year contract by Respondents of the immediate past superintendent of the Paducah, Kentucky School District to assume the present position of superintendent for Respondent school district, commencing July 1, 1983, was legally improper. Petitioners would suggest that the position of superintendent of the present Respondent School District must be filled by either the prior superintendent of the Berkeley or Kinloch School Districts, should either *or both* desire the position.

To suggest that Petitioners should have been considered along with and among the class of all principals of both the Berkeley and the Ferguson Reorganized R-2 School Districts in 1976, in order to determine which two members of the then entire class would be appointed to the two available positions of

assistant principal, is a fallacious and bootstrap argument. While the record is clear that the position of principal in the Kinloch School District was lesser than or, at best, equal to the position of assistant principal in the new judicially enlarged district, there was no evidence offered by Petitioners that the position of principal in either the Berkeley or Ferguson Reorganized R-2 School Districts was not a *greater* position than that of assistant principal in the new combined District. Accordingly, such a transfer from principal within either the Berkeley or Ferguson Reorganized R-2 School Districts may be assumed to have constituted a demotion.

The Fairness of the Promotion Process

The difficult question of the objectivity of the subjective standards (or *vice versa*) utilized by Respondents in selecting candidates other than Petitioners for the available positions, is perhaps best illustrated by the fact that both the majority and the dissenting opinions of the Eighth Circuit's panel decision relied upon the same case to sustain their respective positions. *Royal* v. *Missouri Highway and Transportation Commission,* 655 F.2d 159 (8th Cir. 1981). (*See* Slip Opinion at 7 and 15, 17). The use of subjective criteria for promotion is not prohibited *per se,* but merely "must be closely scrutinized because of their susceptibility to discriminatory abuse." *Paxton* v. *Union National Bank,* 688 F.2d 552, 563-64 n. 15 (8th Cir. 1982). "*It may be* that the subjective nature of an employer's hiring procedures or criteria is relevant to a demonstration of pretext by the employment discrimination plaintiff." *Gay* v. *Waiters' and Dairy Lunchmen's Union, Local No. 30,* 694 F.2d 531, 555 n.19 (9th Cir. 1982). (Emphasis supplied).

The well-established promotional system employed by Respondents did not violate any procedural standards of *Singleton,* of its progeny or of this Honorable Court. Purely objective standards would neither produce the desired result of the best qualified individual for the position, nor do they comprise the method of choice for Presidents or Justices.

CONCLUSION

Both the facts and law as determined by the District Court, a panel of the Eighth Circuit and the Eighth Circuit *en banc*, are patently correct and consistent with fairness, equality and the practicalities associated with the efficient and capable administration of a large integrated urban school district. To reverse the decisions below would create an unmanageable situation in the Respondent School District and engender horrendous problems for numerous other school districts similarly situated for years to come.

It is submitted that Petitioners have not presented any special or important reasons, such as those stated in Supreme Court Rule 17, for the granting of the Writ of Certiorari. Indeed, Petitioners' arguments merely quarrel with the District Court's findings of fact. They, in effect, seek to retry the facts in a manner foreclosed by this Honorable Court's decisions in *Inwood Laboratories, Inc.* v. *Ives Laboratories, Inc.*, 456 U.S. 844, 857 n. 20 and *Pullman Standard, a division of Pullman, Incorporated*, v. *Swint*, 456 U.S. 273, 286 n. 16.

WHEREFORE, Respondents pray the Petition for Writ of Certiorari be denied forthwith.

Respectfully submitted,

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